Filed 8/2/19 P. v. Terry CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL TERRY et al.,

Defendants and Appellants.

F074349

(Super. Ct. Nos. SF017608A, SF017608B)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

Sanger Swysen & Dunkle and Stephen K. Dunkle for Defendant and Appellant Daniel Terry.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant Talin Piccione.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein, Alice Su, and Keith P. Sager, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendants Daniel Terry and Talin Piccione were charged with assault with a deadly weapon by a prisoner (Pen. Code,[1] § 4501). The information further alleged Terry was previously convicted of two "strike" offenses (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)) and two serious felonies (§ 667, subd. (a)); and Piccione was previously convicted of two "strike" offenses (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)) and a serious felony (§ 667, subd. (a)). On June 15, 2016, the jury found defendants guilty as charged. In a bifurcated proceeding, the trial court found true the special allegations. Thereafter, the court denied a motion for new trial based on newly discovered evidence and granted in part a *Romero*[2] motion. Terry received an aggregate sentence of 22 years, consisting of a 12-year upper term plus 10 years for the two prior serious felony convictions. Piccione received an aggregate sentence of 17 years, consisting of a 12-year upper term plus five years for the prior serious felony conviction.

On appeal, Terry contends the trial court erroneously denied the new trial motion. In addition, defendants jointly contend the court discredited or otherwise created an impression of judicial bias against the defense by persistently disparaging Piccione's attorney. We conclude: (1) the court's denial of the new trial motion did not constitute an abuse of discretion; and (2) the court's remarks were not so prejudicial that they denied defendants a fair trial.

On our motion, the parties submitted supplemental briefing addressing whether the matter should be remanded for reconsideration of sentencing in view of recent amendments to sections 667 and 1385, enacted by Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Senate Bill No. 1393) (Stats. 2018, ch. 1013, §§ 1-2, eff. Jan. 1, 2019). Defendants argue the case should be remanded to afford the trial court an opportunity to exercise its newfound sentencing discretion as to the prior serious felony enhancements.

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1 Unless otherwise indicated, subsequent statutory citations refer to the Penal Code.

2 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

The Attorney General concedes a remand for this limited purpose is appropriate. We accept this concession.

STATEMENT OF FACTS

On March 19, 2013, Jeff Cooke, an inmate at Wasco State Prison (Wasco), was called over to a table in the dayroom to speak with the "shot caller."[3] The shot caller was accompanied by two other prisoners, including Piccione. When Cooke sat down, Piccione left. While Cooke was talking with the shot caller, Cooke was struck from behind. He turned around and saw Piccione and another inmate, Terry. Meanwhile, the rest of the prisoners "ran to the other side of the dayroom." Piccione punched Cooke's left side and Terry stabbed Cooke's right side. Cooke fell on the floor. As Piccione continued his attack, Terry went to a nearby cell and "shov[ed] something under the door." Cooke then heard a toilet flush. By the time correctional officers arrived, Cooke was bleeding "pretty bad." Cooke was hospitalized and received stitches in his arm and back. Cooke was subsequently transferred to a "Special Needs Yard."

Gutierrez, a correctional officer, was in the control booth at the time of the incident and "called a code one, inmates fighting . . . ." He observed Cooke, Piccione, and Terry lying face down on the dayroom floor within a foot of one another. There was blood on Cooke's right arm and shirt as well as on Piccione and Terry. No other prisoner was within 10 feet of the trio.

Chan, a correctional sergeant, responded to Gutierrez's "code one alarm." He also observed Cooke, Piccione, and Terry lying face down on the dayroom floor. There was blood on Cooke's forearm and on Piccione's and Terry's clothing. According to Chan, the other prisoners were "all scattered from those three."

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[3] A "shot caller" is the prisoner who "controlled the . . . pod . . . ."

Thomas, a correctional sergeant, photographed Cooke, Piccione, and Terry after the incident. Piccione had blood on his left forearm and Terry had "marks on his hands." There was also blood on Piccione's and Terry's clothing.

At trial, Piccione testified he arrived at Wasco several days before the incident and shared a cell with Kyle Trammell. In the days leading up to the incident, Trammell received notes from other prisoners, one of which "mentioned that there might be a problem with one of the other inmates in the building at the time." On March 19, 2013, for the first time since his arrival, Piccione exited his cell. At one table in the dayroom, Trammell introduced Piccione to Cooke and Michael Hardy. Piccione recognized Hardy as the shot caller. Afterward, Piccione visited another table and met Terry for the first time. Approximately "five to ten minutes after that," Piccione "heard . . . a scuffle behind" him. He turned around and saw Cooke lying on the floor "unconscious and bleeding" and Trammell and Hardy "walking away from the incident." When a correctional officer ordered the inmates to "get down," Piccione "got down" and "noticed that there was blood on the floor." On cross-examination, when the prosecutor asked whether he "got [blood on his clothing] from lying on the ground," Piccione averred, "Yes."

DISCUSSION

I. The trial court's denial of the motion for new trial based on newly discovered evidence did not constitute an abuse of discretion

a. *Background*

At the outset of the August 30, 2016 sentencing hearing, Terry's attorney Tony Lidgett requested a continuance to prepare and file a new trial motion based on the testimony of Micah Edson, Cooke's Wasco cellmate at the time of the incident. Lidgett specified:

> "My investigator recorded the complete conversation between Mr. Edson and himself. [¶] . . . [¶] The interview, in a nutshell, talks about

what Mr. Edson witnessed on that day. He gives . . . a history of his roommate, . . . Cooke. He talks about the mental instability of Mr. Cooke . . . and he talks about how he was just mentally not right in a way. He always acted in an odd way, which is consistent with some of the information that we received in his medical report. [¶] He was also a witness to the facts and the events that occurred on the day in question . . . . [¶] He specifically was near Mr. Terry throughout the whole ordeal when it occurred. He knows Mr. Terry because . . . he was a cellmate of . . . Cooke. They were neighboring cellmates. And they spoke quite a bit through the intercom system every time that they would come out for either breakfast, lunch, dayroom, whatever, . . . they talked to one another because they were right next to one another. [¶] He talks about . . . the events that occur, including the fact that the prison was understaffed at the time. And he talks about how when . . . Terry[and] Piccione were . . . wrongfully taken away, they got the wrong people. [¶] He also talks about they never did search anybody else for blood. They never checked anybody else's knuckles for weapons – I mean for any type of defensive or offensive type wounds. The only thing they did with the other inmates was check their belts to see if they could find some type of weapon. That was it. [¶] He said he actually got to witness the events. Mr. Terry was actually next to him, close to him, in proximity, and he had a view of Mr. Terry during the entire time. [¶] And he says never during that time period did Mr. Terry ever engage or whatever. In fact, they were looking over at what occurred."

The court queried:

> "Mr. Lidgett, let me ask you this. Why is it that on the day of sentencing, three and a half years after the events, after a jury trial, after multiple continuances we now magically have a witness?"

Lidgett answered:

> "[I]t was totally coincidental in nature. . . . [F]ound him at Lerdo. He actually contacted us. We had no idea about him. Contacted, learned about it . . . ."

Regarding Lidgett's request, the prosecutor countered:

> "What I can tell the Court is that for two reasons a new trial would be denied if Mr. Lidgett is given the opportunity to file the motion on this basis. [¶] One, one of the main elements, as the Court brought up, is that a party could not, with reasonable diligence, have discovered and produced the new evidence at trial. [¶] Mr. Lidgett was provided, on January 4th, 2016, as was [Piccione's attorney] Mr. [J. Anthony] Bryan, with the offender's cellmate history logs for the victim and both defendants. [¶]

Sure enough, stated in . . . Cooke's cellmate history log is . . . Edson at the time of the incident. It shows that he was his cellmate at that time. [¶] Second of all, Mr. Lidgett has the ability to speak to his client, Mr. Terry. [¶] According to Mr. Edson's statement, Mr. Terry and Mr. Edson were talking the entire time, sitting together. They were down on the floor together while this entire incident was occurring. [¶] Certainly, Mr. Terry would have had the ability to tell Mr. Lidgett, hey, here's the guy that I was with the entire time. Perhaps we should talk to him and bring him in or interview him to find out what he has to say. [¶] He certainly had the ability . . . to find out this information long before two days ago, when we are two months out from trial and sentencing has already been pushed off twice.

"The second reason why the new trial motion would be denied if Mr. Lidgett is given the opportunity to do this is we cannot rely on unreliable information for the new trial. And the basis of that is *People* [*v.*] *Howard*[(2010)] 51 Cal.4th 15. [¶] The credibility of the offered evidence must be there in order to determine whether the introduction would render a different result reasonably probable. [¶] Your Honor, what I can provide to the Court today is exactly how Mr. Terry and Mr. Edson came into contact. [¶] Mr. Edson was serving a parole violation and got put into CRF[4] less than two hours apart from the day that Mr. Terry got convicted and taken into custody at CRF on this actual case. [¶] On the same day that Mr. Terry is being handcuffed and taken into CRF, because he was remanded by the Court, Mr. Edson is committing a parole violation and being taken into CRF as well. [¶] They are housed four cells apart from each other, and they're also taken into the holding area during the same time and returned to the holding area at exactly the same time, 2221 hours. Meaning that during the whole time that they were in the holding area they would have had every opportunity to . . . discuss the case for Mr. Edson to find out why Mr. Terry was there. [¶] Certainly they recognized each other because prior to this incident they lived next to each other in prison. [¶] So it's rather convenient that all of a sudden this new witness comes out of nowhere when Mr. Terry and Mr. Edson just happen to be at CRF four cells away from each other exactly the same date and exactly the same time. [¶] That's exactly why this information was not provided prior to the time is because they haven't had a time to concoct this story . . . . [¶] Mr. Edson puts himself closer to the incident to Mr. Terry which contradicts all of the officers' statements. He also puts Mr. Piccione in a location that's not right next to Mr. Terry. As Mr. Piccione testified to on the stand, he was right

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4 "CRF" stands for "Central Receiving Facility."

next to Mr. Terry. [¶] So Mr. Edson's statements are completely unreliable. [¶] . . . [¶]

"Because this information, if it were true, would have been found with reasonable diligence on behalf of Mr. Lidgett and Mr. Terry in working together creating their defense at the time of trial, but was not, a new trial cannot be granted. [¶] And a second grounds a new trial cannot be granted is because this information is completely unreliable based on how these two came into contact with each other again and based on the fact that Mr. Edson's testimony is contrary to that of multiple officers as well as the co-defendant, Mr. Piccione."

Thereafter, the court ruled:

"I don't see that the prongs of *Howard* and *Mehserle*[5] and *Delgado*[6] are met. I am highly skeptical of newly discovered evidence the day before the sentencing, three and a half years later. [¶] . . . [¶] Many attorneys . . . [exercising] reasonable diligence would have found Edson and spoken to him. [¶] . . . [¶] Motion for a new trial based on newly discovered evidence is denied."[7] (Italics added.)

b. *Analysis*

"In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: ' "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits." ' [Citations.]" (*Delgado, supra,* 5 Cal.4th at p. 328; accord, *People v. Howard* (2010) 51 Cal.4th 15, 43 (*Howard*); *Mehserle, supra,* 206 Cal.App.4th at p. 1151.) "In addition, 'the trial court may consider the credibility as well as materiality of the evidence in its

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5 *People v. Mehserle* (2012) 206 Cal.App.4th 1125 (*Mehserle*).

6 *People v. Delgado* (1993) 5 Cal.4th 312 (*Delgado*).

7 While it does not appear the court expressly ruled on Lidgett's request for a continuance to prepare and file the new trial motion, by virtue of denying said motion, said request was essentially rejected.

determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable.' [Citation.]" (*Delgado, supra,* at p. 329; accord, *Howard, supra,* at p. 43; see *People v. Huskins* (1966) 245 Cal.App.2d 859, 862 ["Was a different result on retrial probable? . . . [T]he test . . . is an objective one based on all the evidence, old and new, whether any second trier of fact, court or jury, would probably reach a different result."].)

" ' "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' [Citations.]" (*Delgado, supra,* 5 Cal.4th at p. 328; accord, *Howard, supra,* 51 Cal.4th at pp. 42-43; *Mehserle, supra,* 206 Cal.App.4th at p. 1151.) "Under the abuse of discretion standard, 'a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.) In other words, "[a] court abuses its discretion when its ruling 'falls outside the bounds of reason.' [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 371; see *People v. Brown* (2004) 33 Cal.4th 892, 901 [" ' "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling . . . , itself correct in law, will not be disturbed on appeal merely because given for the wrong reason." ' "].)

We conclude the court's ruling did not fall outside the bounds of reason.[8] " 'The claim of newly discovered evidence warranting a new trial is universally looked upon by the courts with distrust and disfavor. Public policy demands that a litigant should be compelled to exhaust every reasonable effort to produce at his trial all existing evidence

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8 Given this conclusion, we necessarily uphold the court's implicit denial of Lidgett's continuance request. (See *ante,* fn. 7.)

in his behalf. It has been said that the circumstance that the testimony has just been discovered when it is too late to introduce it is so suspicious that courts require the very strictest showing of diligence.' [Citation.]" (*People v. Yeager* (1924) 194 Cal. 452, 491.) Here, the prosecutor pointed out the defense—prior to trial— received documentation establishing Edson was Cooke's cellmate at the time of the incident. When Lidgett requested the continuance, he asserted Edson knew and regularly conversed with Terry because they were in neighboring cells, witnessed the incident firsthand, and could provide an alibi for Terry because he "was near . . . Terry throughout the whole ordeal when it occurred." Curiously, however, Terry never disclosed an acquaintance with Edson to Lidgett. Instead, Lidgett came across this information only because Edson "coincidental[ly]" contacted him after trial ended and before sentencing. (Cf. *People v. Greenwood* (1957) 47 Cal.2d 819, 822 ["Facts that are within the knowledge of the defendant at the time of trial are not newly discovered even though he did not make them known to his counsel until later . . . ."].) Moreover, this exchange also occurred after Edson and Terry reunited at the Lerdo jail facility, where they were "housed four cells apart from each other" and "taken into the holding area" "at exactly the same time." (See *People v. Gompertz* (1951) 103 Cal.App.2d 153, 163 ["It is not uncommon, after trial, for one not charged with a crime to attempt to absolve his fellow confederate who has been convicted. [Citation.] The trial court was not bound to accept the statement of [the witness] as true. [Citation.] It was entitled to regard it with distrust and disfavor."].) Given the circumstances, the court could reasonably find Edson's proposed testimony "lacked credibility" and "would not have changed the result on retrial." (*Delgado*, *supra*, 5 Cal.4th at p. 329.)[9]

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9 For this reason, we reject Terry's contention the denial of the new trial motion "deprived him of his right to due process under the federal and state Constitutions because the newly discovered evidence probably would have resulted in an acquittal upon retrial." (Boldface & some capitalization omitted.)

II. The trial court's remarks to Piccione's attorney J. Anthony Bryan were not so prejudicial that they denied defendants a fair trial

a. *Background*

In Los Angeles County, Cooke was convicted of assault with a deadly weapon (§ 245, subd. (a)(1)) in January 2012 and residential burglary (§ 460, subd. (a)) in December 2012. In the instant case, the trial court granted defendants' motion in limine requiring the prosecution to "disclose the existence of any moral turpitude convictions of any witnesses it intends to call," including Cooke.

During Lidgett's cross-examination of Cooke, the following colloquy transpired:

> "Q. . . . [The] shot caller – or at least another one, had requested your paperwork.[10] Is that right?
>
> "A. Correct.
>
> "Q. And you stated or you told him you could not provide the paperwork. Is that right?
>
> "A. Correct.
>
> "Q. Why couldn't you provide the paperwork?
>
> "[PROSECUTOR]: Objection; relevance. [¶] . . . [¶]
>
> "THE COURT: Overruled. [¶] You can answer.
>
> "THE WITNESS: L.A. County provides the paperwork. So they give you the paperwork to take with you to Wasco, and they didn't give me the paperwork. [¶] . . . [¶]
>
> "Q. Are you aware that you can get your paperwork from many sources?
>
> "A. I – that was something I did do. I applied for my paperwork.
>
> "Q. You didn't do so at this time. Is that right?

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10 Cooke testified the term "paperwork" refers to "paper that shows . . . [one's] crimes." At Wasco, "the shot caller asks to see all the [inmates'] paperwork when [they] get there."

"A. I didn't have it at that point, no.

"Q. Were you afraid of them finding out what was contained therein?

"A. No.

"Q. You understand the hierarchy that is within the prison walls. Is that right?

"A. Now more so than then.

"Q. People that commit crimes against children and women are at the lowest. Is that right?

"A. Correct. [¶] . . . [¶]

"Q. . . . [Y]our assault [conviction], [section] 245[, subdivision](a)(1), which we have a lengthy time period, was for an assault on a woman. Is that right?

"[PROSECUTOR]: Objection; violates motions in limine.

"MR. LIDGETT: I believe she opened the door to her questioning.

"THE COURT: One second. [¶] With her direct exam, Mr. Lidgett?

"MR. LIDGETT: I believe with her direct examination she did, and I believe his last answer right there, he wasn't scared. He knows the hierarchy, should be scared. It goes to credibility in this question. [¶] . . . [¶]

"THE COURT: Overruled. [¶] You can answer. [¶] . . . [¶]

"Q. The [section] 245[, subdivision](a)(1) [conviction], the assault with a deadly weapon, is where you took a brick and beat a woman with it. Is that right?

"A. That's what I was accused of, yes. [¶] . . . [¶]

"Q. Did you plead to it?

"A. I did sign the deal to get out of jail, yes.

"Q. And you pled to a charge of the underlying facts that you took a brick and smashed a woman's head in on a number of occasions?

"A. No.

"Q. No?

"A. Not a number of occasions.

"Q. A number of times with one brick on one time?

"A. Yes.

"Q. And you weren't afraid that if that information got out to the shot caller that serious ramifications could occur?

"[PROSECUTOR]: Objection; relevance.

"THE COURT: Overruled. [¶] You can answer.

"THE WITNESS: No. [¶] . . . [¶]

"Q. And there's nothing about the underlying facts that led to the [section] 460[, subdivision](a) [conviction], the first-degree burglary, that have caused you any ill issue with other people in custody?

"[PROSECUTOR]: Objection; relevance.

"THE WITNESS: No.

"[PROSECUTOR]: Violates motions in limine.

"THE COURT: The objection will be overruled. The answer will stand."

During Bryan's cross-examination of Cooke, the following colloquy transpired:

"Q. Okay. [¶] Now, were you at all concerned about the nature of your convictions?

"A. No.

"Q. Okay. [¶] Now, you discussed yesterday the fact that one of them involved bashing a female in the head with a brick. [¶] Wasn't that of some concern to you in the prison pecking order?

"A. No. [¶] . . . [¶]

"Q. Okay. [¶] Now, . . . you're in prison for burglary, right?

"A. Correct.

"Q. [Section] 460[, subdivision](a), right?

"A. I believe so.

"Q. Okay. [¶] What's burglary, do you know? What the crime of burglary is?

"A. I'm not quite sure.

"Q. Okay. [¶] The crime of burglary – a lot of people think . . . it has something to do with theft. Well, it frequently does. [¶] You understand that burglary is not necessarily a theft crime? It's the entering with a criminal purpose?

"A. Yes.

"Q. Okay. [¶] Were you concerned that anyone would find out about what the purpose you had in entering that home?

"[PROSECUTOR]: Objection; violation of motions in limine. [¶] . . . [¶]

"THE COURT: . . . . [¶] You phrased that, Mr. Bryan – that would be the length of the question.

"MR. BRYAN: I'm sorry?

"THE COURT: That's the end of it. [¶] You can answer. [¶] Cooke, you can answer.

"THE WITNESS: No.

"THE COURT: Okay. [¶] . . . [¶]

"Q. . . . . [¶] Did you want [the shot caller] to think that your burglary was a theft burglary?

"[PROSECUTOR]: Objection; relevance. [¶] . . . [¶]

"THE COURT: Did you want him to think? [¶] Overruled. [¶] You can answer.

"THE WITNESS: No. [¶] . . . [¶]

"Q. Okay. [¶] Because you knew it wasn't a theft burglary, right?

"[PROSECUTOR]: Objection; violation of motions in limine.

"THE COURT: Sustained."

After the morning recess and outside the jury's presence, the following colloquy transpired:

"THE COURT: . . . . [¶] . . . [¶] Mr. Bryan wanted to put something on the record regarding the [section] 460 [conviction]. [¶] Go ahead, sir.

"MR. BRYAN: Yes, thank you. [¶] I believe that . . . the nature of [the section] 460 [conviction] is . . . in controversy. [Section] 460 . . . [i]s neutral as to purpose. But purpose is necessary for the crime. And in this case highly relevant. [¶] Presently this jury believes, as do almost all laypersons, in my experience, that this would be a theft, a burglary for purposes of theft. [¶] . . . But that's not correct. That's not what this burglary is about. And [what] this burglary is about [is] the gravamen of this case. The purpose of this guy's entering people's homes is to do weird things, which he admitted he did to the police in that case. . . . [¶] And that's why he didn't have his paperwork. And the fact that he didn't have paperwork is all over this case. And that's why the shot caller is calling him down there. [¶] . . . [¶] And we're being prevented from diving into the waters in this case. [¶] . . . [¶]

"THE COURT: Okay. If it's abundantly clear that the case is about his paperwork and his refusal or otherwise not to show the paperwork, then what does it matter what the underlying cause is, number one? [¶] Number two, yesterday, I was under the impression that we . . . were not going to discuss the . . . facts . . . underlying [the section 460 conviction]. Nobody ever brought up to me whether or not the . . . facts [underlying the section 245 conviction] were going to be discussed. The next thing I know during Lidgett's cross we're somehow getting into . . . [these] facts, which had to do with bashing some woman with a brick. That was never discussed in limine. Okay? [¶] So now, we've got that in. And Mr. Lidgett made it very clear that the worst people on the rung in prison are child molesters . . . and people who abuse women. And clearly we've got a [section] 245 [conviction] with a brick on a woman. [¶] So the jury

. . . very much understands the underlying facts. That he was trying to hide the fact that he didn't want to [have] know[n] his paperwork because he had abused a woman. That's clearly in front of the jury. The jury understands that now. [¶] Why would getting into the . . . underlying facts [of the section 460 conviction] help you at all in light of the fact that . . . you've succeeded in what you wanted to show?

"MR. BRYAN: . . . . [¶] . . . [¶] It's relevant because it's been discussed by him a lot. That is to say the paperwork and the shot caller, but also because any time it's a credibility issue. [¶] He is under a great deal of pressure. He . . . was a man standing on a paper thin, worn out sheet over an abyss, and he knew it . . . . [S]ome guy says, . . . I've got to see the paperwork. And this guy knows he's in deep trouble. . . . [¶] . . . Trammell is there and clearly the assistant of Hardy, the shot caller . . . . [¶] So the fact that he is under this enormous pressure to produce . . . given the pressure he's under, who's he going to identify? Is he going to identify the shot caller, which is perhaps instant death, or these two fellas? [¶] He chose these two fellas. And that is part of our defense, . . . and all we're trying to do is to show the true nature of that burglary for purposes of our defense. [¶] . . . [¶]

"MR. LIDGETT: If . . . Cooke had said he didn't want his paperwork out there, then the underlying facts would not be important. Cooke has said repeatedly he had no problem with his paperwork being known to others and, in fact, shown to others. [¶] Now it's a credibility issue that they would know that if his paperwork came out with all the sexual deviance, which is in there, he would be targeted. [¶] . . . [¶]

"THE COURT: All right. Counsel, under [Evidence Code section] 352,[11] I think that its probative value is outweighed by any prejudicial effect, in light of the fact that you got in everything under the [section] 245 [conviction]. It matches the purpose. You wanted to show why he was hesitant to turn over his paperwork. I think anything further would be too much at this point."

During Lidgett's recross-examination of Cooke, the following colloquy transpired:

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11 "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

"Q. You just testified recently that you've had no problem showing your paperwork. Is that right?

"A. Correct.

"Q. And the paperwork would consist not only of the assault, which we've talked about, where you took a brick and bashed a woman's head in –

"[PROSECUTOR]: Objection. [¶] . . . [¶]

"THE COURT: . . . . [¶] What's the objection?

"[PROSECUTOR]: Violates motions in limine, for the record.

"THE COURT: Well, Mr. Lidgett, . . . I don't think there's any information that her head was bashed in, that she was assaulted with a brick, but go ahead. [¶] . . . [¶]

"Q. In your probation report – were you ever privy to your probation report?

"[PROSECUTOR]: Objection; relevance.

"THE COURT: Overruled.

"THE WITNESS: No. [¶] . . . [¶]

"Q. Never once your attorney talked about in the report it talked about how you violently bashed a woman's head in on a number of occasions because she was sleeping in your bed?

"[PROSECUTOR]: Objection; violates motions in limine.

"THE COURT: Counsel, . . . the issue is whether or not he showed his paperwork.

"MR. LIDGETT: Uh-huh.

"THE COURT: The jury's heard about the [facts underlying the section] 245 [conviction.] [¶] I think I made myself clear where we want to go and what we want to stay away from, so, please, next question. [¶] . . . [¶]

"Q. On [the prosecutor's] redirect she asked you if you had showed others your paperwork. Is that correct?

"A. Correct.

"Q. And did that paperwork consist of just the [section] 245[, subdivision](a)(1) [conviction], the assault with a deadly weapon, or did it also consist of the [section] 460[, subdivision](b) [conviction], the burglary?

"A. It had both."

During Bryan's recross-examination of Cooke, the following colloquy transpired:

"Q. Okay. [¶] Now, in Los Angeles County, you can get a probation report before the trial or a plea. [¶] Did you have a probation report before then?

"A. No.

"Q. Okay. [¶] Had . . . the lawyer that you mentioned advised you not to take the plea, had he . . . made any comment on any probation report?

"[PROSECUTOR]: Objection; calls for hearsay.

"MR. BRYAN: Your Honor, counsel – the witness –

"THE COURT: No, no, no. Hold on. Just – objection, I'll rule on it.

"MR. BRYAN: I'm sorry.

"THE COURT: If I want a response from one of you, I'll ask.

"MR. BRYAN: I'm sorry, Judge.

"THE COURT: I'm quite certain I've set those ground rules at some point in this – we're getting to the point, Counsel, where there's going to be a new coat of paint at the homeless shelter and not that cheap shit from Lowe's. The good stuff, one coat, 60 bucks a gallon. [¶] Proceed.

"MR. BRYAN: Thank you. [¶] . . . [¶]

"Q. . . . . [¶] Did your attorney make any comment on . . . any probation report?

"[PROSECUTOR]: Objection; hearsay.

"THE COURT: Overruled.

"THE WITNESS: So that's not this case. This is the case prior to this one why I'm here in prison? [¶] . . . [¶]

"Q. This would be the burglary case, sir.

"A. No.

"Q. Okay. [¶] How about the assault case?

"A. To be honest, I don't know what a probation report even is.

"Q. Oh, okay. [¶] Well, did he comment on the police report in the assault case?

"[PROSECUTOR]: Objection; calls for hearsay.

"THE COURT: Well, Mr. Bryan, if he can't recall, number one, and number two, are we possibly getting into an attorney/client privilege area? [¶] So . . . I'm not exactly sure what you're after –

"MR. BRYAN: May –

"THE COURT: – but go ahead.

"MR. BRYAN: May I respond? [¶] Oh, I'm sorry.

"THE COURT: Ask him another question.

"MR. BRYAN: Okay.

"THE COURT: Sustained.

"MR. BRYAN: May I comment on the Court's query?

"THE COURT: Yes.

"MR. BRYAN: When he testified that he was not acting under the advice of his attorney when he pled guilty, that was waiving a privilege. And if I cannot cross-examine on it, then that should be stricken and the jury should be admonished.

"THE COURT: Well –

"MR. BRYAN: That is to say his –

"THE COURT: Well, hold on. [¶] What does whether or not he spoke with his attorney about taking that deal help these 13 people determine whether or not those two guys attacked him?

"MR. BRYAN: Your Honor –

"THE COURT: If I may.

"MR. BRYAN: I'm sorry.

"THE COURT: I know I realize I'm thinking crazy now. [¶] But if we could just kind of focus here. We're almost done. We could get him off and get another witness in here and we could start plowing this field, if we could. [¶] So, Mr. Bryan, I don't see the relevance of this anymore. [¶] If you want to try to wrap it up with what the attorney did or didn't do, let's do that. But attacking him on how he reviewed his paperwork or what decision he tried to make is not going to have a whole lot of bearing on whether or not these two guys attacked him. [¶] So off we go.

"MR. BRYAN: I'm not the one that asked the question. It was counsel.

"THE COURT: I appreciate that.

"MR. BRYAN: And I was merely trying to cross-examine on the item that she raised.

"THE COURT: I appreciate that. [¶] Did you ever see the movie The Karate Kid? [¶] You could paint the fence like this. You could paint the fence like this."

Lidgett moved for a mistrial. Outside the jury's presence, he asserted:

"When a witness takes the stand and their credibility is at issue, when Mr. Bryan was asking questions, he was asking questions, I believe, about both the [section] 460[, subdivision](a) and the [section] 245[, subdivision](a)(1) [convictions] . . . that w[ere] suffered by the victim in this case. [¶] And he was doing so because the witness had testified previously that he was not fearful of his paperwork getting out to anybody. [¶] The defense believes that if his paperwork had gotten out, he would be

in fear, he would also know that he should be in fear, and he did not want his paperwork to get out. [¶] . . . [The prosecutor] went into the fact that you showed your paperwork and nothing has occurred to you. [¶] Mr. Cooke's credibility is the sole basis for this case. [¶] In other words, our clients are going to be found guilty or not guilty based on his testimony alone. He is the only witness. [¶] There is limited corroborating evidence that will be brought forth. [¶] When Mr. Bryan was asking the questions, he was trying, in my opinion, to get into the credibility of Mr. Cooke to show that Mr. Cooke is an absolute liar and one who[se] opinion and testimony cannot be trusted.

"The Court admonished Mr. Bryan in front of the jury . . . . Admonished Mr. Bryan in saying what does what he did a number of years ago have anything to do with whether or not Mr. Piccione and Mr. Terry committed the crimes to which they were charged? [¶] In my opinion, it's extremely important because it goes to his credibility. It would be another instance where we could show from the defense point of view that he is untrustworthy and cannot be believed. [¶] Credibility is always up to the jury to determine. The statements that the Court made, in my opinion, to Mr. Bryan, basically, made it seem like they were not important, whatsoever. [¶] And that's why I said I needed to bring the motion, because it sounded like the Court, who the jury is going to look to for the law, and what the law means, told them that his past, Mr. Cooke's past, has nothing to do with this case and whether or not . . . these guys are guilty of the crime. [¶] I disagree. I believe it goes directly to his credibility. We want to attack his credibility as much as possible, because we have no idea what is in the jury's mind. [¶] . . . [¶] And with the Court admonishing Mr. Bryan in front of them, I felt that the Court had told them that his [section] 245[, subdivision](a)(1) and/or [section] 460[, subdivision](a) [convictions], they were not important as to whether or not Mr. Piccione and/or Mr. Terry committed the crimes to which are alleged. And I think they are extremely important. [¶] It goes directly to the heart of our case, to the credibility of Mr. Cooke."

Bryan, who joined the motion, added:

"Why is all this going on? [¶] It's going on because of what's in that paperwork. It's going on because [of] what's in that police report. It's going on because of the underlying facts in those two cases. [¶] The Court has commented that, quote, we've gotten it in. No, we haven't. I've asked a bunch of questions. They have been successfully stifled by objection. And in the instance that is the subject of this mistrial, there was an objection by counsel. There was, in my opinion, a speech, short speech, by

the Court. And I was not allowed to speak. I couldn't even make an offer of proof. I couldn't argue my position with or without the jury present.

"It was very clear it was approaching a hostile situation. And I was told in front of the jury, and I believe the jury was told that these matters that I . . . had been trying to get into are unimportant, that they mean nothing. The credibility of this witness is not important. His paperwork isn't important. Why . . . he committed the burglaries is not important. [¶] . . . [¶] . . . [W]e have been totally stifled into going into what this burglary was about. And that's why [Trammell] and [Hardy] are in Cooke's face. Because of what's in that stuff. [¶] . . . [¶] It's this fear of having certain kinds of past behavior known. That's what this is about. And he's denied it, Mr. Cooke. And he's now denying it with impunity because he knows that we're not being allowed to expose it. [¶] And the commentary I believe trivialized our defense in a highly critical manner and erroneously told the jury that all we're concerned about are the physicality of what happened that day. And I do believe I remember the Court saying that nothing that happened back there is important. It's what happened in prison. [¶] That's the whole point. We're trying to show the truth. And the truth is that what happened in prison is because of paperwork. [¶] And . . . that paperwork focuses on [Hardy] and Trammell. . . ."

The court denied the motion. It reasoned:

"I did have the opportunity to review the transcript again. And I agree with counsel that credibility is at issue here. But this was, in my opinion, clearly an attempt to get into the [section] 460[conviction']s underlying facts that I have repeatedly excluded. [¶] The discussion I had with Mr. Bryan had to do with Cooke's review of paperwork with his attorney on the prior [section] 460 [conviction] and what was reviewed by the attorney and what they discussed, not with reference to the paperwork shown to [Trammell] and Hardy . . . . It had nothing to do with the credibility and did not trivialize this in any fashion. It's a straight [Evidence Code section] 352 analysis. [¶] [Cooke's] discussions with counsel in another proceeding are collateral to the issues here. The jury is aware of the [section 245] conviction and [its] underlying facts . . . . Discussions about the circumstances of his plea [are] not going to help the jury in this particular case with what he discussed with his attorney at a prior time. [¶] Therefore, it's an undue consumption of time in this trial. [¶] I do believe I've ruled on it and made myself clear. However, it appears that counsel feels that if they continue to bring it up and rehash it, they're hoping that the Court will change its mind. I will not. [¶] . . . [¶] It's a straight [Evidence Code section] 352 analysis. [¶] Under . . . [s]ection 1044, it states . . . . It shall be the duty of the judge to control all proceedings

during the trial and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with the view to the expeditious and effective ascertainment of the truth regarding the matters involved . . . ."

On the prosecutor's cross-examination of Piccione, the following colloquy transpired:

"Q. I'd like to show you a couple of pictures here. [¶] . . . [¶] You've heard testimony that this was the table that . . . Cooke was sitting at, correct?

"A. Yes.

"Q. Okay. [¶] . . . [¶] And that's where . . . Cooke was seated, correct?

"A. Um, I'm not sure. . . . I can't tell exactly which way those tables are facing or vice versa. They could be facing any way.

"Q. Well, for the purposes of these questions, then, let's assume that right off this seat right here that has the blood spot on it, you come straight down from there and you've got Cells 104 and 105. [¶] Does that kind of orient you?

"MR. BRYAN: Your Honor, counsel's testifying; assuming facts.

"THE COURT: You can rephrase it, Counsel.

"[PROSECUTOR]: Your Honor – okay. Your Honor, may I be heard?

"MR. BRYAN: If the –

"THE COURT: Would it be easier to just rephrase it, maybe? [¶] . . . [¶]

"[PROSECUTOR]: Your Honor, there's already been testimony.

"MR. BRYAN: Your Honor.

"THE COURT: Hold on.

"MR. BRYAN: Your Honor.

"THE COURT: Thank you, Mr. Bryan. Thank you.

"MR. BRYAN: Your Honor, counsel's arguing –

"THE COURT: Mr. Bryan.

"MR. BRYAN: Counsel's the one that's arguing.

"THE COURT: One more word and I'm going to hold you in contempt. [¶] Ladies and gentlemen, would you be kind enough to step into the hallway so I can take care of something here. [¶] We'll be with you shortly."

Outside the jury's presence, the court remarked:

"Counsel, we're within spitting distance of having this thing done. Okay? [¶] For crying out loud, do we need to fight about every little, tiny insignificant thing? [¶] . . . [¶] Now, while I've got you all here, okay, I've been in enough ball games and court trials to know where we're headed here attitude-wise. Okay? [¶] And . . . let's keep our eye on the prize of this thing almost being done, and let's not get chippy, and let's not get angry, and let's not get egos involved. Okay? [¶] I appreciate the facts of this case and what the facts are and the stakes. I understand that. [¶] Let's not . . . forget we're officers of the court. We need to conduct ourselves accordingly. [¶] I don't want to take anybody in. I don't want to hold anybody in contempt. I don't want to have anybody writing checks for the homeless shelter. [¶] Can we just get this thing done efficiently and quickly, please? [¶] Thank you so much."

Defendants then moved for a new trial to "allow[] defense counsel to impeach the complaining witness fully." At a hearing, the following colloquy transpired:

"[MR. LIDGETT:] The only other thing pointing out, obviously, was when the Court appeared to get mad at Mr. Bryan on one occasion, I do believe that the Court –

"THE COURT: Actually, there's more than one occasion. [¶] Go ahead.

"MR. LIDGETT: Just one occasion I'm talking about. [¶] But on that one occasion it appeared that the Court, in its frustration, gave the appearance to the jury that what Mr. Cooke had to say regarding his other incident . . . with his other attorney was not important. And what we were

trying to show is that Mr. Cooke is a sociopathic liar and that he had lied on everything. And we wanted to get into more because he kept saying this would have no effect, this would have no effect on him if all the facts came out, which is a blatant lie. [¶] And we wanted to keep showing it . . . . I wanted to make certain the jury was getting these lies. [¶] . . . [¶]

"THE COURT: Well, Mr. Lidgett, I think you're looking at Cooke's testimony in a vacuum. [¶] I think he was the first one off the top or the lead-off hitter to the prosecution, but the other witnesses came on and they put on other evidence about the scene . . . . [¶] . . . [¶]

"MR. BRYAN: . . . [M]y client's chances were severely compromised when the Court threatened me in front of the jury . . . with painting fences. You'll be painting fences. [¶] . . . [¶] I was being an advocate and I was attempting to pursue what I believed to be absolutely legitimate questioning of Mr. Cooke, and his background and . . . some of that was allowed. And the Court, at some point, felt that I had gone over the line and threatened me, thusly, in front of the jury. And I believe that the Court's then comment on the case and what the case was like, that followed the statement about me painting fences, I'm more concerned with what . . . the Court's then what I would certainly characterize total trivialization of the case and the defense regarding what we had to do in this case and what should be done in this case. [¶] And I think that, obviously, jury's certainly take that stuff, I think very, very seriously."

The court denied the motion. Regarding its prior remarks to Bryan, it commented:

"So as I recall, the issue was whether or not the victim's prior crimes and convictions were relevant to the case at bar. The defense felt that the underlying facts were necessary to show why he was attacked. [¶] Defense was not satisfied that the jury could hear of a [section] 245 [conviction] and a [section] 460 [conviction], but wanted bashing in of the woman's head, which was allowed in, and the sexual references to the burglary, which I explicitly stated was out. [¶] The Court ruled repeatedly that these underlying facts were not relevant. It told counsel repeatedly not to go into them. Counsel, however, seemingly unaccustomed to following the rules and obeying the Court['s] orders, continued to try to get into this evidence. Even to go so far as to get into plea discussions the victim may have had with a legal representative involving the underlying offenses. [¶] The Court did not want to hold an attorney who's been practicing law since this Court was five years old in contempt. [¶] So the Court reminded counsel and then reminded him again on multiple occasions, even by use of an analogy and metaphor of the pending ramifications of not obeying the Court's orders. [¶] This Court has the ability to control the examination of

> the witnesses and chose to do so here. [¶] Evidence was presented that the victim was attacked for failure to show his paperwork. And this evidence included bashing in a woman's head with a brick. [¶] However, what the victim discussed with his attorney during plea negotiations or the fact[s of] . . . the burglary case was neither material or relevant and certainly did not help in the expeditious and effective ascertainment of the truth in this case."

b. *Analysis*

"Although the trial court has both the duty and the discretion to control the conduct of the trial [citation], the court 'commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution' [citation]. Nevertheless, '[i]t is well within [a trial court's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior.' [Citation.] Indeed, '[o]ur role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.' [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 78 (*Snow*).)

At the outset, the court granted defendants' motion in limine requiring the prosecution to disclose, inter alia, Cooke's prior convictions for assault with a deadly weapon and residential burglary. On cross-examination, Cooke indicated he was not afraid of what his paperwork set forth about these convictions but acknowledged he did not provide it to Hardy. Lidgett elicited testimony that inmates who committed crimes against women are at the bottom of the prison hierarchy and made known through his line of questioning that Cooke pled guilty to a crime in which he "smashed a woman's head" "[a] number of times with one brick." Bryan elicited testimony that Cooke was not concerned the shot caller or anyone else would discover the circumstances surrounding his burglary conviction. Thereafter, outside the jury's presence, the court specifically

instructed defense counsel not to broach the underlying facts of Cooke's burglary conviction. It emphasized the defense established (1) "the worst people on the rung in prison [include] people who abuse women"; and (2) Cooke was convicted of a violent act against a woman. On the basis of Evidence Code section 352, the court determined further inquiry into the facts underlying the burglary would have been an undue consumption of time since evidence as to why Cooke would have been hesitant to turn over his paperwork to Hardy had already been admitted. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 611 ["[T]he state has a strong interest in prompt and efficient trials, and that interest permits the nonarbitrary exclusion of evidence, including 'when the presentation of the evidence will "necessitate undue consumption of time." ' "].)

During the defense's recross-examination of Cooke, Lidgett delved into whether Cooke had been advised by his former attorney in the assault case that a probation report "talked about how [he] violently bashed a woman's head in on a number of occasions . . . ." After the prosecutor objected, the court reminded defense counsel the jury was aware of the facts underlying the assault conviction and "what . . . to stay away from . . . ." Bryan then asked Cooke whether his former attorney in the assault and/or burglary case had "made any comment on any probation report . . . ." After the prosecutor objected, the court remarked: "[W]e're getting to the point, Counsel, where there's going to be a new coat of paint at the homeless shelter and not that cheap shit from Lowe's. The good stuff, one coat, 60 bucks a gallon." Later, the court cast doubt on whether Cooke's conversations with his former attorney in an earlier proceeding would be sufficiently probative on the matter of whether defendants attacked Cooke. When Bryan protested, the court retorted: "Did you ever see the movie The Karate Kid? [¶] You could paint the fence like this. You could paint the fence like this." During the prosecutor's cross-examination of Piccione, Bryan raised a form objection. When the court tried to have the prosecutor rephrase the contested question, Bryan persistently

interjected. Ultimately, the court told Bryan, "One more word and I'm going to hold you in contempt."

We do not believe the court's behavior " 'was so prejudicial that it denied [defendants] a fair, as opposed to a perfect, trial. [Citation.]" (*Snow, supra,* 30 Cal.4th at p. 81.) At trial, Cooke acknowledged he did not provide his paperwork to Hardy but insisted he had nothing to hide. The defense presented impeachment evidence, including the facts underlying Cooke's assault conviction. Before Lidgett or Bryan could delve into the facts underlying Cooke's burglary conviction, the court explicitly instructed them not to do so. On recross-examination, Lidgett and Bryan asked Cooke what his former attorney said with regard to the content of probation reports connected with the assault and/or burglary. Given the defense already introduced evidence of the facts underlying Cooke's assault conviction and the court exercised its discretion under Evidence Code section 352 to exclude evidence of the facts underlying Cooke's burglary conviction, the court deduced the purpose of the defense's line of questioning on a "collateral" concern was to circumvent its evidentiary ruling and admonished Bryan. In doing so, the court neither discredited the defense nor " ' "officiously and unnecessarily usurp[ed] the duties of the prosecutor . . . and in so doing create[d] the impression that he [was] allying himself with the prosecution." ' [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 347.) As for the court's subsequent rebuke in connection with a form objection raised during Piccione's cross-examination, it appears the court did not appreciate Bryan's interruptions. Piccione's appellate counsel characterized the defense as having "pushed the envelope and then some." By his own admission, Bryan "was a gadfly" and "extremely persistent." Regardless, the court's warning to Bryan was simply an attempt to rein in counsel's overzealousness. The court did not "engage[] in a pattern of disparaging defense counsel . . . in the presence of the jury" or "convey[] the impression that he favored the prosecution." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1238.) "We

conclude that imperfect as the trial court's behavior may occasionally have been, it did not deprive defendant[s] of a fair trial . . . ." (*Snow, supra,* 30 Cal.4th at p. 82.)[12]

III. The case will be remanded to afford the trial court an opportunity to exercise its sentencing discretion as to the prior serious felony enhancements

At the time defendants were charged, convicted, and sentenced, section 667, former subdivision (a)(1), provided, in part:

> "In compliance with subdivision (b) of [s]ection 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately."

Section 1385, subdivision (a) and former subdivision (b) then provided, in part:

> "(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. . . .
>
> "(b) This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667."

After defendants were sentenced, but while their case was still pending on appeal, the Legislature enacted Senate Bill No. 1393 (Stats. 2018, ch. 1013, § 1). As of January 1, 2019, section 667, subdivision (a)(1), provides, in pertinent part:

> "Any person convicted of a serious felony who previously has been convicted of a serious felony in this state . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately."

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12 In a separate brief, Piccione lists instances in which the court made remarks to defense counsel regarding its penchant for trial efficiency and expediency, regarding its preferred structure of objections, and overruling defense's objections at various times. In view of these innocuous comments, our conclusion remains the same.

Former subdivision (b) of section 1385 was deleted (Stats. 2018, ch. 1013, § 2, eff. Jan. 1, 2019).

In their supplemental briefs, defendants assert Senate Bill No. 1393 applies retroactively to the case and a remand for reconsideration of sentencing is proper. The Attorney General agrees. We accept this concession.

DISPOSITION

On remand, the trial court shall exercise its sentencing discretion under section 1385, as amended by Senate Bill No. 1393 (Stats. 2018, ch. 1013, § 2, eff. Jan. 1, 2019), and, if appropriate following exercise of that discretion, resentence defendants accordingly. In all other respects, the judgment is affirmed.

_____
DETJEN, Acting P.J.

WE CONCUR:

_____
SMITH, J.

_____
MEEHAN, J.